MOTION FILED

FEB 2 8 2001

(4)

No. 00-1210

IN THE
Supreme Court of the United States

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Petitioner,

v.

STEVE GARVEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE PETITION

DAVID E. FELLER*
Special Counsel
Boalt Hall
Bancroft at Piedmont
Berkeley, CA 94720-7200
(510) 642-0629

JOHN KAGEL
President
P.O. Box 50787
Palo Alto, CA 94303

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

19 pp

IN THE

Supreme Court of the United States

No. 00-1210

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Petitioner,

v.

STEVE GARVEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Academy of Arbitrators respectfully moves for leave to file the attached *amicus curiae* brief in support of petition for certiorari herein. Counsel for petitioner has given its consent that such a brief be filed. Counsel for respondent has refused. The letters granting and denying consent have been lodged with the clerk.

INTEREST OF *AMICUS CURIAE*

The National Academy of Arbitrators, founded in 1947, is a professional organization of neutrals. Advocates for employers of labor unions are not eligible for admission. As of May 2000 the Academy had 624 members in the United States and Canada. To be considered for membership, an

arbitrator must demonstrate acceptability by labor and management through substantial and current experience in arbitrating labor-management disputes (a bare minimum of 50 cases within 5 years with a variety of parties) or, as an exception, must enjoy general recognition as an important authority in labor management relations through scholarly publication or other activities in addition to demonstrating current but more limited experience in arbitration.

The principle purpose of the Academy, as set out in its Constitution, are "to establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of labor-management disputes on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes . . . ; to promote the study and understanding of the arbitration of labor-management and employment disputes . . . ."

The Academy is the co-author and major adjudicator of an ethical code, the previously mentioned Code of Professional Responsibility, which has also been adopted by the American Arbitration Association and the Federal Mediation and Conciliation Service. In addition, the proceedings of the annual meetings of the Academy, published by the Bureau of National Affairs, constitute the most authoritative existing collection of studies on the labor arbitration process.

The Academy has only once before filed a motion for leave to file a brief *amicus curiae* in support of a petition for certiorari. In that case, *UBC Southern Council of Industrial Workers v. Bruce Hardwood Floors.* 522 U.S. 928 (1997), we urged that the Court grant certiorari because the decision below was not only contrary to the decision of this Court and some other circuits but was "a pernicious undermining of the system of industrial jurisprudence that has served the nation well in reducing industrial strife." It amounted, we urged, to a "standing invitation to both employers and unions to seek

judicial review of arbitration decisions to which they disagree." The Court granted our motion for leave to follow but denied certiorari.

This case is like *Bruce Hardwood Floors* in that it provides an opportunity for the Court to arrest a disease that has spread further since certiorari was denied in that case and which, if not attended to, will sap the vitality of a sound system of industrial relations. We believe that it is appropriate that an organization dedicated to the preservation of that system be given an opportunity to express its views in support of review.

Respectfully submitted,

DAVID E. FELLER*
Special Counsel
Boalt Hall
Bancroft at Piedmont
Berkeley, CA 94720-7200
(510) 642-0629

JOHN KAGEL
President
P.O. Box 50787
Palo Alto, CA 94303

*Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST AND CONCERN OF THE *AMICUS*	1
SUMMARY OF THE ARGUMENT	2
REASONS FOR GRANTING THE WRIT	3

TABLE OF AUTHORITIES

CASES — Page

Circuit City Stores, Inv. v. Adams, No. 99-1379.... 11

Eastern Associated Coal Corp. v. United Mine Workers, No. 99-1038..... 7

Goodall Sanford, Inc. v. United Textile Workers, 353 U.S. 550 (1957)..... 10

Hawaii Teamsters v. United Parcel Services, 229 F. 3d 847 (9th Cir. 2000). 6

Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997) *cert. denied* 118 S. Ct. 295 (1997).... 10

Textile Workers Union v Lincoln Mills, 353 U.S. 448 (1957)..... 10

UBC Southern Council of Industrial Workers v. Bruce Hardwood Floors, 522 U.S. 928 (1997) No. 97-95, pp. 2-6. 6

United Food & Commercial Workers v. United Markets, 784 F.2d 1413 (9th Cir. 1986). 6

United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987). 3, 5, 6, 9

United Steelworkers of America v. Aurora Equipment Co., 830 F. 2d 753 (7th Cir. 1987).. 10

United Steelworkers v. Enterprise Wheel & Car Corp. 363 U.S. 564 (1960)..... 5

STATUTES

Judicial Code, 29 U.S.C. § 1291 ..... 9, 10

Labor Management Relations Act, 1947 § 301, 29 U.S.C. § 185.....3, 9, 10

Federal Arbitration Act, 9 U.S.C. §§ 1-16..... 10

OTHER AUTHORITIES

Feller, *Putting Gilmer Where it Belongs: The FAA's Labor Exemption*, 18 Hofstra Labor & Employment Law Journal 253, 267 (2000)..... 11

TABLE OF AUTHORITIES—Continued

Page

Feller, *Taft and Hartly Vindicated: The Curious History of Review of Labor Arbitration Awards*, 19 Berkeley Journal of Employment and Labor Law 296 (1998)..... 12

Flynn, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 Ohio State Journal on Dispute Resolution 91, 96 (2000)..... 7

Hayford, *The Federal Labor Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 Berkeley Journal of Employment and Labor Law 521 (2000)..... 12

Leroy and Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 Indus. Rel. L.J. 78 (1991)..... 6

IN THE

Supreme Court of the United States

No. 00-1210

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Petitioner,

v.

STEVE GARVEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE PETITION

INTEREST AND CONCERN OF THE *AMICUS CURIAE*

The interest and concern of the National Academy of Arbitrators is set out in full in the motion for leave to file to which this brief is appended and will not be repeated here.[1]

[1] Rule 37.6 statement: Counsel of record is the author of this brief, as well as the accompanying motion for leave to file it. No person or entity other than the National Academy of Arbitrators has made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Certiorari should be granted to arrest the increasing tendency of Courts of Appeal, exemplified by this case, to circumvent the decisions of this Court regarding arbitration under collective bargaining agreements. It should also be granted so that the question of the applicability of the Federal Arbitration Act to labor arbitration may be fully briefed, argued and decided.

REASONS FOR GRANTING THE WRIT

The petition for certiorari, as well as the dissent from the first decision of the Ninth Circuit, demonstrate that the decision sought to be reviewed is plainly contrary to the decisions of this Court. It flies in particular in the face of *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). The Ninth Circuit was wrong when it set aside the arbitration award denying Garvey's claim and was egregiously wrong when, in the second decision, it ordered that the arbitrator enter a decision for Garvey. We need not burden the Court by reiterating the demonstrations of error. Our purpose is different. We recognize that this Court does not sit just to correct errors. Certiorari should be granted if the case presents an issue of importance in the administration or development of the law. We believe that it does.

1. Although this case has some unique characteristics, it presents a common and recurrent issue. This case arises from the collective bargaining agreement between the baseball players' union and their employers. Because the contestants are an employee, Garvey, and his union, it does differ from the usual case in which vacatur of an arbitration decision is sought but the difference is immaterial. The law to be applied, as the Ninth Circuit recognized in its first decision, is the LMRA § 301law governing the grounds on which the labor-management arbitration may be set aside. And the distinction which the Ninth Circuit drew between this case and "ordinary labor disputes" in that there was no "adversarial process . . . [that] helps ensure that arbitrable conclusions are sound" [2] was simply false. There was a true adversarial process.[3] The Association had a real and vital

---

[2] Pet. 29a.

[3] Indeed this was alleged in Garvey's amended complaint "Following the execution of the Settlement Agreement, however, MLBPA's role

interest in seeing to it that only those truly entitled to be compensated were rewarded. The settlement fund was fixed and the claims filed by players greatly exceeded it. Those which were in fact allowed after arbitration substantially exceeded the funds available. Thus the net effect of the award to Garvey that the court mandated will be a reduction in the amount received by other players whose claims were sustained.[4]

---

shifted from its prior representation of players to a role adverse to the players when it was given the task of proposing a framework for submission and evaluation of individual player claims and of proposing a distribution plan for each class of claims. Player/claimants could object to the proposals submitted by MLBPA, to which objections the MLBPA could respond, and such objections would be resolved through arbitration." (Complaint ¶ 4, Excerpts of Record in the Court of Appeals [ER] 0002).

[4] The Arbitrator on July 11, 1999, before the Ninth Circuit's decision requiring an award to Garvey, had already determined that all the player awards for 1989 had to be cut by 16.5 percent:

> "I have considered a number of options in an effort to bring the greatest degree of equity and fairness to the 1989 lost salary claimants vis-à-vis the entire universe of collusion claimants. In that process I have rejected such suggestions as ordering a further review of individual claims in an effort to impose downward adjustments and thereby move closer in the totality to the Framework allocations. Further, I have rejected the possibility of adjusting the amount of damages available within service classes of claimants as violative of the Framework. The conclusion I have reached is that the device of an across-the-board percentage reduction of the total damages must be adopted. This approach is incorporated in the 1989 Plan as constructed by the Players Association but I find it necessary to advance the percentage of the reduction proposed therein. The review I have independently conducted of the Plan, as well as the upward adjustment of some proposed distribution sums resulting from the objection process, requires that the percentage reduction imposed be set at 16.5 percent." ER 005680, v. 5, p. 6.

This case must, therefore, be seen as in *pari materia* with the hundreds of cases in which an arbitrator's decision in a labor management dispute is sought to be vacated. As such it is another and egregious example of the cases in which the lower courts have set aside arbitration decisions with which they disagree. Many of the lower federal courts have adopted a simple formula when faced with a decision with which they disagree: First set out the correct rule that a court has no business vacating an arbitration award simply because it believes it to be wrong. Cite *Enterprise* [5] and *Misco*. Then, go ahead and find some reason why the particular award involved nevertheless has to be set aside because it is wrong. By so doing they avoid the possibility of review. They have set forth the correct rule of law even while deciding the case exactly contrary to that rule.

The disservice to arbitration as a system of industrial jurisprudence is not just that particular decisions are set aside despite the parties' agreement that the arbitrator's decision shall be final and binding. The disservice is far greater. It serves as a virtual invitation to anyone dissatisfied with a particular decision to contest its validity. And, in doing so, even when the contest is lost, it undermines the system of industrial jurisprudence that has, with the support of the Court, served the nation well in reducing industrial strife.

The invitation that this formula offers has increasingly been accepted. In the twenty-two year period from 1960, the date of *Enterprise Wheel and Car*, through 1981 there were 187 cases in all of the circuits in which the validity of a labor arbitration was contested, for an average of 8.5 per year. But in the later ten year period from 1982 through 1991 there were more than 240 such cases, for an average of 24 per year. Similarly, the number of reported district court decisions

---

[5] *United Steelworkers v. Enterprise Wheel & Car Corp.* 363 U.S. 564 (1960).

involving a claim for vacatur of an arbitration decision increased from an average of 24 per year in the twenty-one year period following *Enterprise* to 50 per year in the 1982-91 period. Equally significant the percentage of cases in which a contested award was enforced in the courts of appeal dropped from 74.9% in the earlier period to 67% in the later one.[6]

One device used by the lower courts to set aside labor management arbitration decisions has been the "plain meaning rule," adopted by some circuits. If the arbitrators reading of the relevant collective bargaining agreement provision is different from the court's, the court will say that the meaning which it prefers was plain and therefore the arbitrator's award should be set aside. We canvassed the decisions adopting this approach in our brief in support of the petition in the *Bruce Hardware Floors* case[7] and will not repeat them here. We add that following the decision in this case the Ninth Circuit, citing this case, has joined the circuits that follow this practice. *Hawaii Teamsters v. United Parcel Services*, 229 F. 3d 847 (9th Cir. 2000). See also *United Food & Commercial Workers v. United Markets*, 784 F.2d 1413 (9th Cir. 1986) (Kennedy, J. dissenting).

A second line of attack, applicable to discharge cases, had been the proposition that a court should set aside an arbitration award ordering reinstatement if the offense which the employee committed was in violation of public policy. Here too there was an expansion in the number of cases. In the 28 year period from 1966 through 1988 there were 54 cases in which public policy was raised as a bar to the

---

[6] Leroy and Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 Indus. Rel. L.J. 78 (1991).

[7] *UBC Southern Council of Industrial Workers v. Bruce Hardwood Floors*, 522 U.S. 928 (1997) No. 97-95, pp. 2-6.

enforcement of an arbitration decision for an average of 1.9 per year. In the 11 year period from 1988 to 1991 there were 84 such cases for an average of 7 cases per year.[8] Fortunately this Court's decision in *Eastern Associated Coal Corp. v. United Mine Workers,* No. 99-1038, decided this Term, will provide a damper on this proliferation.

This case presents yet a third method of attack on an arbitration decision: The arbitrator's finding of fact. The arbitrator here was faced with contradictory testimony and he resolved it against the claimant Garvey. The Court of Appeals, in a fashion familiar to those experienced with the phenomenon, began by duly reciting the Section 301 cases in this Court limiting the scope of review of an arbitrator's decision under a collective bargaining agreement. But, like the courts invoking the plain meaning rule, it went on to conclude that the reasons given by the arbitrator to resolve this conflict were so implausible that in reaching his decision the arbitrator "dispensed his own brand of industrial justice," and vacated the award.

The court then went on to demonstrate beyond peradventure of a doubt that, rather than conforming to the principles of law it first announced, it was substituting its judgment for that of the arbitrator. In his complaint Garvey requested that the award denying his claim be set aside and that a de novo arbitration hearing be held.[9] On remand after the Ninth Circuit set aside the award the district court ordered just that. But counsel for Garvey having been handed the finger he had first asked for demanded the whole hand: that

---

[8] *See* Joan Flynn, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 Ohio State Journal on Dispute Resolution 91, 96 (2000).

[9] "WHEREFORE, Garvey prays . . . that the Court remand the May 1, 1997 Arbitration Award to the Arbitration Panel for a de novo arbitration hearing . . . ." Complaint, p. 22, ER 0022.

judgment be entered for Garvey on his claim. When the district court refused Garvey appealed and the Ninth Circuit complied, directing the district court to direct the arbitrator to enter an award for Garvey.

The Ninth Circuit thus demonstrated by its own action that the reason assigned for setting aside Robert's decision was false. In its first decision it set aside his award because he must have been "dispensing his own brand of industrial justice." If so, a further arbitration before another arbitrator would avoid that error. Indeed, in concurring in the first decision Judge Hawkins set out what he believed an arbitrator not dispensing his own brand of justice could have done.[10] But when the district court directed that a new arbitrator proceed to decide the case de novo, thus enabling action in accordance with Judge Hawkins's suggestion, the Court of Appeals reversed it. In concurring with this second decision, Judge Whyte, who had dissented from the first decision, acknowledged that in its first decision the court had indeed not merely intended to set aside arbitrator Roberts's award as "dispensing his own brand of industrial justice" but had intended to decide the merits. He therefore concurred in the second decision. Pet. 4a.

We concur in the petitioner's assertion that it is so clear that the Ninth Circuit has violated all fundamental precepts of

---

[10] "The second thing the arbitrator might have done would have been to take a more cautious approach. Smith's later statement, after all, was not under oath, and it is one thing to say 'I lied' in a letter or an interview and quite another to serve up a prosecutable case of perjury by admitting under oath that prior testimony was a knowing, deliberate, and premeditated falsehood. Recognizing this, the arbitrator could have directed that Smith testify under oath concerning his more recent statements. And, if such a cautious arbitrator had done that, even though one might disagree with the end result—the 'strike call,' if you will—a reviewing authority would be required, I would think, to accept an arbitrator's weighing of the two sworn statements." Hawkins, J. concurring, Pet. 32a.

labor arbitration law in this case that summary reversal would be warranted. We disagree, however, that it is desirable. A summary reversal simply citing the applicable decisions of this Court would do nothing to remedy the situation. What is necessary is that something be done to arrest the trend which we have identified. It is understandable that courts, accustomed as they are to being the final arbiter as to the meaning of contracts or the facts, should fail to recognize that in this area they must suppress their natural inclination to correct what they have believed to be wrongly decided. And so it may be necessary every ten years or so to remind the lower courts that in this area this is not their function. Oral argument, we do agree, is not necessary. But something, we submit, must be said by this Court if the system that has served management, labor and the nation so well is to be preserved. A per curiam opinion restating and emphasizing what this Court said in *Misco* about the standards governing labor arbitration will suffice.

2. In addition to underlining the error of the Ninth Circuit's first opinion in this case, the second opinion raises a second and important issue that warrants review. That issue is not encompassed within the question presented by the petitioner but it is an issue that this Court can and should raise *sue sponte*: jurisdiction. In its first opinion the Ninth Circuit held, correctly, that the district court's jurisdiction rested on Section 301 of the Labor Management Relations Act of 1947. When the district court remanded the case for a second arbitration hearing, however, there was a second jurisdictional question: whether the Court of Appeals had jurisdiction to hear an appeal from that order. The jurisdictional question was raised by the union on the appeal. Issue number one in its brief was stated to be "Whether this Court has jurisdiction over Garvey's appeal from the period of the district court order remanding this matter for further arbitration." An order remanding a vacated arbitration is not a final order under 28 U.S.C. §1291, the union argued. An

order directing arbitration under a collective agreement is a final order under § 1291, *Goodall Sanford, Inc. v. United Textile Workers*, 353 U.S. 550 (1957), but there is respectable authority for the proposition that, when an arbitration award is vacated, any remand to arbitration is not. As the Seventh Circuit held in *United Steelworkers of America v. Aurora Equipment Co.*, 830 F. 2d 753 (7th Cir. 1987) "We think it possible to distinguish between an order to arbitrate and a remand to the arbitrator." This is particularly true in this case because the direction to award damages to Garvey that Garvey sought (and ultimately obtained) would require calculation of the reduction in the amount of his claim (as well as other claimants' claims) that would be required because of the limited amount of the fund available. The Court of Appeals, however, avoided deciding the §1291 question by saying that it had jurisdiction on the second appeal under Section 16 (a)(3) of the Federal Arbitration Act. By resting jurisdiction on appeal on the FAA the Ninth Circuit thus presented squarely the question of whether the Federal Arbitration Act applies to arbitration under a collective bargaining agreement.

This is an important question which this Court has never definitively decided. It has been discussed at length in *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997) *cert. denied* 118 S. Ct. 295 (1997). This Court, in *Textile Workers Union v Lincoln Mills*, 353 U.S. 448 (1957), held that enforcement of the arbitration provision in a collective bargaining agreement could be based on Section 301. The Court simply ignored the FAA. It did not hold that it was inapplicable. In subsequent cases, particularly the *Steelworkers Trilogy* the Court relied on Section 301 in decisions regarding arbitrability and the enforcement of awards once made under a collective bargaining agreement, again ignoring the Federal Arbitration Act's provisions.

This Court did say in *Misco*, in a footnote unnecessary to the decision and without explanation or authority, that the FAA does not apply to "contracts of employment of . . . workers engaged in foreign or interstate commerce" [11] because of the exemption in Section 1. The scope of the commerce requirement in that section is before this Court in *Circuit City Stores, Inv. v. Adams*, No. 99-1379. How that question is decided will have no relevancy, however, if a collective bargaining agreement is not considered to be a "contract of employment." [12]

The time may now have come for the Court to eliminate the duality in the law governing labor and commercial arbitration agreements. Section 301 may still be necessary as a ground for district court jurisdiction. But once the jurisdictional question is settled, there may be little reason for continuing any difference between arbitration under Section 301 and arbitration under the Federal Arbitration Act with respect to questions of arbitrability and vacatur. The rule with respect to arbitrability is, as the law has developed, the same under Section 301 and the FAA. However, a difference has emerged with respect to the enforceability of awards under the two regimes, a difference to the detriment of labor arbitration deriving from language in *Enterprise* such as that seized upon here by the Ninth Circuit. The Academy has not taken a position with respect to the applicability of the FAA to labor management arbitration but sensible arguments have been made that the FAA, and in particular the provision limiting vacatur in Section 10(a), should be held to cover labor management arbitration.[13] We believe that the question is of

---

[11] 484 U.S. 29, 41, n. 9 (1987).

[12] *See* Feller, *Putting Gilmer Where it Belongs: The FAA's Labor Exemption*, 18 Hofstra Labor & Employment Law Journal 253, 267 (2000).

[13] Id. at 276 ff.; Hayford, *The Federal Labor Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 Berkeley

sufficient importance that the Court should take the step of granting certiorari and requesting the parties to brief and argue the question of whether the FAA applies to arbitration under a collective bargaining agreement.

Respectfully submitted,

DAVID E. FELLER*
Special Counsel
Boalt Hall
Bancroft at Piedmont
Berkeley, CA 94720-7200
(510) 642-0629

JOHN KAGEL
President
P.O. Box 50787
Palo Alto, CA 94303

*Counsel of Record

Journal of Employment and Labor Law 521 (2000); Feller, *Taft and Hartly Vindicated: The Curious History of Review of Labor Arbitration Awards*, 19 Berkeley Journal of Employment and Labor Law 296 (1998).